Supreme Court, U.S.
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No. 99-112

In The

Supreme Court of the United States

JOHN WILBUR McFADDEN, JR., M.D.,

Petitioner,

v.

MISSISSIPPI STATE BOARD OF MEDICAL LICENSURE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Mississippi

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the disciplinary procedures utilized by the Mississippi State Board of Medical Licensure provided Petitioner with all due process rights under the United States and Mississippi Constitutions.

II. Whether the questions and comments posed by members of the Mississippi State Board of Medical Licensure, as triers of fact and law during an administrative hearing, violated Petitioner's rights to due process.

NOTE: Respondent disputes the manner in which Petitioner framed his "Questions Presented for Review."

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

Disciplinary Procedures Utilized by Board Provided Adequate Due Process 4

The Statements and Questions Posed by the Board Members did not Cast Doubt on the Board's Impartiality 7

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES:

Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964) 6

Illinois Cent. R.R. Co. v. Town of Goodman, 252 Miss. 297, 173 So. 2d 116 (1965) 5

McGowan v. Miss. State Oil & Gas Bd., 604 So. 2d 312, 318 (Miss. 1992) 5

Mississippi State Bd. of Health v. Johnson, 197 Miss. 417, 19 So. 2d 445 (Miss. 1944) 5

Mississippi State Board of Nursing v. Wilson, 624 So. 2d 485 (Miss. 1983) 4

Wildberger v. AFGE, 86 F.3d 1188 (D.C. Cir. 1996) ..6, 11

Winthrow v. Larkin, 421 U.S. 35, 43 L.Ed.2d 712, 95 S.Ct. 1456 (1975).....5, 6, 7, 11

TREATISE:

2 Am. Jur. 2d, *Administrative Law* § 50 (1994)..... 8

STATEMENT OF THE CASE

Petitioner seeks review of a February 4, 1999, decision of the Mississippi Supreme Court, affirming an unpublished opinion and order of the Chancery Court of Hinds County, Mississippi, affirming the decision rendered by the Mississippi State Board of Medical Licensure (hereinafter "Board") on November 22, 1996. The Board's decision placed certain restrictions on the Mississippi medical license of John Wilbur McFadden, Jr., M.D. (hereinafter "Petitioner"), based upon the Board's finding that Petitioner's conduct in his medical practice violated numerous sections of the Mississippi Medical Practice Act, and the rules and regulations promulgated by the Board pursuant to its rulemaking authority. Specifically, after a two (2) day hearing at which substantial evidence both for and against Petitioner was considered, the Board found Petitioner guilty of eleven (11) separate counts of administering, dispensing, and prescribing narcotic drugs (or other drugs having addiction-forming or addiction-sustaining liability) in a manner that was "otherwise than in the course of legitimate professional practice."

The Board further found that Petitioner's conduct of his medical practice was unprofessional, including dishonorable or unethical conduct likely to harm the public. Most importantly, the Board found that Petitioner was guilty of numerous violations of the Board's rules and regulations pertaining to the prescribing, administration, and dispensing of controlled substances. Of particular concern to the Board was Petitioner's failure to adequately monitor his patients' consumption of the significant quantities of controlled substances that he prescribed to them. The violations were significant in two

respects, (a) the rules and regulations of the Board provided clear guidance as to Petitioner's (or any other practitioner's) use of controlled substances and, (b) Petitioner had been warned on at least two (2) prior occasions without Board disciplinary action, relative to proper patient monitoring.

The suspension of Petitioner's license, however, was automatically stayed on the condition that he comply with certain probationary terms and conditions imposed by the Board. The stay granted by the Board permitted Petitioner to continue to practice medicine, subject to some limitations. Such limitations prevented Petitioner from prescribing certain controlled substances on an out-patient basis, but did not preclude him from administering controlled substances to patients who had been duly admitted to a hospital, or prescribing other drugs on an out-patient basis, such as anti-inflammatory agents, antibiotics, non-controlled analgesics, and numerous other prescription-only medications.

During the investigation and disciplinary proceedings Petitioner was provided every due process protection provided by both the U.S. and Mississippi Constitutions, summarized as follows:

1. Between 1992 and 1998, Petitioner was warned by the Board on at least two (2) occasions concerning improper maintenance of controlled substance records and monitoring patients who receive controlled drugs. Said warnings were non-disciplinary in nature.

2. Members of the Board did not participate in the investigation. Investigations are conducted by a separate investigative unit, the employees of

which do not communicate with the Board about pending investigations.

3. Petitioner received Notice of Hearing on or about June 12, 1996, setting forth the specific charges and supporting facts/circumstances.

4. A continuance was granted by the Board, thus allowing Petitioner five (5) months to prepare for his defense.

5. The full disciplinary hearing lasted two (2) days, November 21 and 22, 1996.

6. At said hearing Petitioner was represented by able counsel.

7. None of the Board members made any factual findings of guilt or participated in any reasonable cause determinations prior to the hearing.

8. At said hearing Petitioner called numerous witnesses on his behalf and introduced a substantial number of exhibits into evidence.

9. At said hearing Petitioner, through his counsel, cross-examined Board investigators and expert witnesses.

10. The Board considered only evidence in the record.

11. The Board did not deliberate or meet concerning this case except during the scheduled hearing dates.

12. The Board was represented by a Special Assistant Attorney General, who was not privy to the facts of the investigation prior to the hearing and who did not play any part in the prosecution. He acted solely as an objective advisor to the Board during hearing and deliberation.

13. The Complaint Counsel, retained for the specific purpose of prosecuting the matter, did not recommend sanctions or participate in the Board's executive session (deliberation).

14. At the hearing, Board Member Dr. Benton Hilbun, Tupelo (McFadden's hometown) recused himself.

15. Following the hearing, the Board rendered its "Determination and Order," setting forth its specific Findings of Fact, Conclusions of Law, and Order. Said Order is approximately 30 pages in length and is attached to Petitioner's Brief as Appendix D.

During the two days of testimony the Board considered "substantial credible evidence," a standard by which decisions of administrative boards are reviewed under Mississippi law. *See Mississippi State Board of Nursing v. Wilson*, 624 So. 2d 485 (Miss. 1983). In order to conserve the Board's time, resources and simplify the issues, the investigators (with advice from an independent medical expert) chose four (4) cases representative of the 36 files seized from Petitioner's office.

REASONS FOR DENYING THE WRIT

Disciplinary Procedures Utilized by Board Provided Adequate Due Process

Petitioner contends that he was denied due process of law because, in his opinion, the Board acted as investigator, prosecutor and judge. Petitioner further asserts that the questions and commentary by Board members were not to ascertain the true facts regarding Petitioner's administration of controlled substances for patients in

intractable pain, but to condemn him. Petitioner's denial of due process claim is based almost entirely upon his misrepresentations of various portions of the hearing transcript, in a disingenuous attempt to demonstrate that the Board was biased against him. Petitioner, however, also challenges the constitutionality of the institutional processes of the Board on the grounds that its combination of investigative and adjudicative activities offends the due process requirements of our state and federal constitutions.

The Board agrees with the cases cited by McFadden for the proposition that both the United States and Mississippi constitutions guarantee him due process before an administrative agency. It is also undisputed that administrative proceedings "must be conducted in a fair and impartial manner, free from any suspicion of prejudice, unfairness, fraud or oppression." *Mississippi State Bd. of Health v. Johnson*, 197 Miss. 417, 19 So. 2d 445, 447 (Miss. 1944). Furthermore, the Board agrees that an administrative board charged with resolving a dispute cannot take "the affirmative for an[d] in behalf of the protestant in deciding the issues in [a] case." *Illinois Cent. R.R. Co. v. Town of Goodman*, 252 Miss. 297, 173 So. 2d 116 (1965). In sum, "[d]ue process always stands as a constitutionally grounded procedural safety net in administrative hearings." *McGowan v. Miss. State Oil & Gas Bd.*, 604 So. 2d 312, 318 (Miss. 1992).

Unlike Petitioner, however, the Board agrees with the prior holdings of this Court which have held that in the case of administrative hearings, due process is not offended because the administrative board performs both the investigative and adjudicative functions. *Winthrow v.*

Larkin, 421 U.S. 35, 43 L.Ed.2d 712, 95 S.Ct. 1456 (1975), holding that "it is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. Notwithstanding this Court's decision in *Winthrow v. Larkin*, the Mississippi Board has taken additional steps (not mandated by law) to ensure a fair hearing. Of particular note, the Board's investigative staff independently prepares cases for presentation to the Board, without the involvement of Board members. The first time Board members are exposed to the substantive facts of a particular case is at the hearing on the matter. The actual preparation of cases is performed by the investigative staff, a medical consultant, and (typically) an expert witness, operating with legal assistance from the Board's Complaint Counsel.

The above facts clearly distinguish the procedures utilized by the Mississippi Board from that construed in *Winthrow v. Larkin, supra*, and *Wildberger v. AFGE*, 86 F.3d 1188 (D.C. Cir. 1996). In *Winthrow*, the members of the Wisconsin Medical Examining Board, conducted their own investigation, conducted reasonable cause determination hearings and later engaged in the contested hearing. In *Wildberger* the disciplinary procedure, including the investigation, determination of probable cause and hearing adjudication, was conducted by one individual. The Board also distinguishes the case cited by Petitioner, *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964), wherein the Fifth Circuit found a due process violation based upon a denial of Ms. Hornsby's liquor license, a decision made without a due process hearing, without an

opportunity to introduce evidence and to cross-examine witnesses, and without even an explanation revealing the basis for denying her application.

By comparison, the procedures utilized by the Mississippi Board have clearly gone beyond that required in *Winthrow v. Larkin* to ensure that Petitioner, as well as any other practitioner, are provided all elements of due process.

The Statements and Questions Posed by the Board Members did not Cast Doubt on the Board's Impartiality

It is a well established rule of law that there is a presumption that the officers conducting an administrative hearing and the members of the Board behave honestly and fairly in conducting the hearing and in the decision-making process. Absent some showing of personal or financial interest on the part of the hearing officer or evidence of misconduct on the officer's part, this presumption is not overcome.

The Mississippi Supreme Court, after a fair reading of the transcript of the hearing at issue, concluded that Petitioner received a fair and impartial hearing, was free from any suspicions of prejudice, unfairness, fraud or oppression. While "20/20 hindsight" may suggest that it would have been better for the Board members to keep all of their opinions regarding the evidence to themselves, it has been recognized by widely respected authorities that "a contentious atmosphere can be expected in many administrative hearings, and an attitude bordering on partisanship and even hostility, as

reflected in exchanges between the adjudicator and the charged party does not in and of itself prove bias." 2 Am. Jur. 2d, *Administrative Law* § 50 (1994). *By stating this, however, we do not intend to imply or even suggest that the Board was hostile or partial.* To the contrary, as evident from the record and arguments below, the Board members were not only objective, but extremely lenient in their approach to Petitioner's repetitious violations.

At the hearing on this matter all Board members were allowed to direct probative questions to the witnesses. Petitioner has taken a number of these questions/comments completely out of context or totally exaggerated their true meaning or intent. The questions/comments now at issue were presented with good purpose and intent to elicit information deemed necessary by the Board to make an objective decision. Being physicians themselves, Board members are often in the position of asking questions that a respondent physician may regard as "tough" or "unpleasant." It is here where Petitioner has totally misconstrued the purpose of the Board and has reached an ill-conceived conclusion of bias and prejudice. Simply stated, just because the question is a "tough" one that elicits information a respondent would rather suppress does not automatically render the person(s) asking the question "biased" or "prejudiced," as Petitioner would apparently have this Court believe.

Petitioner claims that one particular Board member stated that Petitioner was "dangerous," and improperly questioned Petitioner's medical expertise. This is simply an inaccurate portrayal of the record. What actually happened was that this particular Board member questioned Petitioner's expertise in diskoprophy because Petitioner

had previously testified that he had no formal training/residency in this specialty, yet he still claimed to be "one of the world experts" in this field. The actual question was whether a lack of formal training might be "dangerous." The Board respectfully submits that this line of inquiry does not show bias or impartiality, but rather was especially probative and relevant given Petitioner's exorbitant claims of expertise.

Further, Petitioner argues that on two occasions the same Board member stated that McFadden's testimony was "meaningless." Petitioner has once again misconstrued the statement by the same board member. In the first instance, Petitioner was giving an answer that rambles on for approximately three pages in the hearing transcript. The Board member was confused as to what sources Petitioner was basing his answers upon. After questioning the validity of the data relied upon by Petitioner, the Board member stated that "[t]his is meaningless." As is evidenced by other questions posed by the Board regarding Petitioner's lack of formal training in pain management, the Board apparently felt that Petitioner's private, non-published, undocumented, and unsubstantiated "research" did not render him a "world expert" on pain management. Given the benefit of "20/20 hindsight," it may have been better had this one particular board member saved his personal doubts as to the validity of Petitioner's claims until the Board moved into executive session. However, the Board respectfully submits that this does not show that the Board was prejudiced or biased against Petitioner.

Petitioner also contends that his witnesses were "attacked" by the Board. Not only is this incorrect, but it

is a total mis-characterization of the testimony contained in the transcript. As an example, one of the Board members asked a witness (one of Petitioner's patients) several questions, all of which were relevant to the issues then before the Board. One of these questions concerned whether said patient was compensating Petitioner for the services he rendered to her. In his brief to the Mississippi Supreme Court, Petitioner accused the Board of attacking this patient "with vengeance." Upon even a cursory review of the transcript, the Board member was not attempting to "trick" or "embarrass" the patient with this line of questioning. The Board respectfully submits that the Board member was merely clarifying a confusing area of the patient's testimony[1]

A substantial portion of the commentary, for which Petitioner voices objection, originated from a single member of a six member panel. Furthermore, the inappropriate and inexcusable characterization in Petitioner's Brief stating that the "panel members took advantage of every opportunity to present evidence," and give "their opinions" is factually incorrect. The six participating Board members were objective and fair. The Board also notes that one of the Board members, who was from the hometown of the Petitioner (Tupelo, Mississippi) recused himself. None of the Board members had a pecuniary interest in the outcome of the case or were targets of personal

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[1] The actual question by Dr. Bush was "[s]o you've been seeing him for a year, and you've paid him nothing? Okay. I'm not trying to embarrass you. It's just that you said that you pay him something."

abuse or criticism (see *Winthrow v. Larkin, supra*). Furthermore, none of the Board members were deemed to be in competition with Petitioner, or had prehearing contacts sufficient to pose a "high risk of bias." *See Wildberger v. AFGE, supra.* Finally, the Board notes that Petitioner's objection to the presence of the Board's Medical Consultant during executive session is without merit. At no time did Petitioner or his attorney voice objection concerning the fair and impartial manner in which the hearing was conducted, nor object to the presence of the Board's Medical Consultant during executive session. Petitioner did not raise this objection during his appeal to the Chancery Court of Hinds County, Mississippi. The issue was not raised until the matter was before the Mississippi Supreme Court, which found said argument to be without merit.

Consistent with the Board's position, the Mississippi Supreme Court found that Petitioner had misconstrued several comments made by the Board members and mistakenly reached the conclusion that the Board was biased against him. The Board will not attempt to address each statement and resulting misconstrual, but calls the Court's attention to the findings of the Mississippi Supreme Court, pages 30A through 33A of Appendix A.

Petitioner also has attempted to characterize this case as illustrative of the "raging debate in the medical community in this country between those who advocate long-term use of opioids for treatment of intractable pain and those who oppose such treatment except in terminally ill cancer patients." At no time during the hearing did members of the Board make it clear that they "came down on

the opposite of this debate." The Board's Order is clearly evidence of this fact, wherein it is stated:

> The Board intends by this Order to set the record that the Mississippi State Board of Medical Licensure does not oppose the use of opioid therapy in the management of chronic non-malignant pain. Nonetheless, all doctors must strictly adhere to the rules and regulations of this Board and properly monitor the supply of drugs prescribed, administered and/or dispensed to the patient. Had Licensee done so, after being warned on June 23, 1992, the disciplinary action taken herein could have been avoided.

It is interesting to note that in support of his argument, Petitioner cites the joint *amicus curiae* brief filed by the American Pain Society (APS) and American Academy of Pain Medicine (AAPM). At page 13 of the *amicus* brief, the APS and AAPM state, "Some pain specialists might maintain their charts differently than Appellant. . . . " Why would the APS and AAPM make such a statement? Simply stated, Petitioner was found guilty in 63 separate instances of failing to maintain a complete record of his diagnosis and reason for prescribing, dispensing or administering controlled substances. This included 43 separate instances of inadequate documentation and 20 separate instances of total lack of documentation.

The opinion of the Supreme Court of Mississippi is consistent with prior decisions of this Court and the federal courts of appeals. McFadden presents no basis in fact for his argument that the Board members based their decision on the evidence which they interjected into the proceedings without the right of cross-examination.

Legitimate and probing questions by board members who, prior to the hearing did not participate in the investigation, were legitimate and appropriate. Like judges, board members when sitting as both triers of fact and law, must ask appropriate and sometimes probing questions. Petitioner's inability to answer such questions in the face of clear and unequivocal violations of the rules and regulations of the Board does not justify a later condemnation of the Board as being "openly hostile."

Petitioner was granted every means of due process by the Mississippi State Board of Medical Licensure, beginning with initiation of the investigation, notice of charges, discovery, and subsequent disciplinary hearing.

CONCLUSION

For the reasons given above, the petition of John Wilbur McFadden, Jr., M.D., seeking a writ of certiorari, should be denied.

Respectfully submitted,

MISSISSIPPI STATE BOARD OF MEDICAL LICENSURE

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